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No. 1170

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE IRVING NORMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1952, in the United States District Court for the Southern District of Ohio, petitioner pleaded guilty to an indictment charging misprision of felony in violation of 18 U.S.C. 4, and was sentenced to imprisonment for a year and a day. In 1966, long after service of the sentence had been completed, petitioner sought to have the conviction set aside on motion for a writ of error coram nobis, on the ground that the indictment failed to state an offense. The district court denied the motion (Pet. App. B. 35-43),

and the court of appeals affirmed (Pet. App. A. 31-34).

There is no reason for further review by this Court. Assuming that the validity of an indictment may be reached at all by a motion in the nature of a writ of error coram nobis, the conviction was subject to attack only if the indictment failed, by any intendment, to charge a crime of the class triable in district courts of the United States. *Rosecrans* v. *United States*, 378 F.2d 561, 566 (C.A. 5), and cases there cited. The present indictment (Pet. 3) was clearly adequate under this test.

The elements of the offense of misprision, defined in the leading case of *Neal* v. *United States*, 102 F.2d 643 (C.A. 8), are (1) that a felony was committed by the principal; (2) that the defendant had knowledge of the felony; (3) that he failed to notify the authorities; and (4) that he took affirmative steps to conceal the crime of the principal.[1]

The defect in the indictment on which petitioner seeks to rely is that, in describing the felony of which petitioner was alleged to have actual knowledge, the indictment stated that Moore knew the described car was stolen but did not say that Moore transported it. The indictment did, however, later allege that petitioner took an affirmative step "to conceal the crime

[1] The federal decisions have held that misprision requires an affirmative act of concealment, rather than a mere passive failure to inform, which was enough at common law. See *Bratton* v. *United States*, 73 F.2d 795 (C.A. 10); *United States* v. *Farrar*, 38 F.2d 515 (D. Mass.), affirmed, 281 U.S. 624. Accordingly, there is no need to read into the statute an additional element of intent.

committed by the said William Moore." The fact that the defendant was charged with having known of and concealed the felony of interstate transportation of a stolen car committed by Moore so clearly appeared from the full allegations that the indictment would have been sufficient to withstand attack, even on direct appeal. See *Hagner* v. *United States*, 285 U.S. 427.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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